In the Supreme Court of the United States

October Term. 1925.

No. 386.

George M. Napier, Attorney General of the State of Georgia,

Appellant,

vs.

Atlantic Coast Line Railroad Company,

Appellee.

Appeal from the District Court of the United States for the Northern District of Georgia.

REPLY BRIEF OF APPELLANT.

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ARGUMENT AND BRIEF OF AUTHORITIES.

The whole of the argument of the appellee is founded on two propositions,

(1) a legal conclusion that as Congress has regulated with reference to an instrumentality of interstate commerce the states are entirely excluded from making any regulations touching such instrumentality, and

(2) an assumption of fact that an automatic firedoor is a safety device and invades the specific field covered by the Federal legislation.

We submit that the statement of law is entirely too broad and contrary to repeated decisions of this Court and

that the assumption of fact is not well grounded, as an automatic firedoor is not primarily a device to promote "safety in operation" but is a protection to the enginemen.

In discussing the scope of the Boiler Inspection Act and its amendments appellee ignores the rule laid down by this Court in *Caminetti vs. United States*, 242 U. S. 470; 61 L. ed. 442,

> "that where the language of a statute is free from doubt it may not be added to or subtracted from by considerations drawn from titles or from any extraneous source, but is the sole evidence of the ultimate legislative intent."

To sustain their present contention that the acts give the Commission power to order equipment on locomotives used in interstate commerce they confuse the language of the title and of the enacting clause. While it is true that the title of the act has reference to "safe" boilers, the body of the act does not contain that expression but merely forbids the use of boilers unless "in proper condition and safe to operate in the service to which they are put." They freely state that the reference to the title is not an attempt to interpret an ambiguity in the body of the statute but to indicate that the body of the act realizes the purpose stated in the title. This is a reversal of the rule above quoted. The body of the act is conclusive as to its purpose, and if there is no power of compulsion therein, it cannot be read into it by resort to the title.

Although appellee contends that the commission has positive power to order equipment as well as negative power to forbid the use of unsafe equipment, they entirely ignore the decision of this Court in *Baltimore and O. R. Co. vs. Groeger*, 266 U. S. 521; 45 Sup. Ct. 169. In that case the Boiler Inspection Law was discussed and this Court by Mr. Justice Butler said, page 528:

"By the last mentioned section (section 2) defendant was bound absolutely to furnish what before, under the common law, it was its duty to exercise ordinary care to provide. The carriers were left free to determine how their boilers should be kept in proper condition for use without unnecessary danger. The things required for that purpose *were not prescribed or changed* by the act;" etc.

This Court further said, page 530:

"The act required a condition which would permit use of the locomotive without unnecessary danger. *It left to the carrier the choice of means to be employed to effect that result.* * * * The interests of the carriers will best be served by having and keeping their locomotive boilers safe; and it may well be left to their officers and engineers to decide the engineering questions involved in determining whether to use fusible plugs *or other means* to that end." (Italics ours)

Appellee argues that the Federal Statute requires a "safe" boiler. Not only free from physical defects and faulty materials, but "safe" in all particulars and equipped with all devices and appliances which *assure* its safety. Does appellee seriously contend that these statutes make a carrier an insurer of its locomotives and boilers?

Appellee also argues that to the interstate commerce commission is delegated the duty to determine what is necessary to make the boiler and locomotive "safe," and the power to order it. This contention is in direct opposition to the holding of this Court in the *Baltimore and O. R. Co.* case, *supra.*

We submit that the foregoing case sets at rest the question as to whether or not the commission has power to order the use of safety devices, and even if it were conceded that an automatic firedoor is a safety appliance, the commission has no power, by virtue of the Boiler Inspection Act or its amendments, to order its installation or use.

Appellee states that appellant recognizes that the Commission has *ordered* the installation of certain equipment. Appellee has misapprehended the brief of appellant as we are unable to find any language which can be construed as such an admission. We deny that the commission either possesses or has attempted to exercise any power to *order* equipment, but recognize that the rules *require* certain equipment as a standard of safety. At some length we argue that there is a vital distinction between the power to *order* and the power to *require* as such standard.

REGULATIONS OF CONGRESS NOT EXCLUSIVE.

The contention of appellee that merely because Congress has regulated interstate commerce by legislation concerning an instrumentality thereof, therefore the states are entirely excluded, will not bear careful examination.

The argument of appellee concedes that the Georgia statute is an attempted exercise of police power but in a field already entered or occupied by the paramount power of Congress. In support of that contention they rely on the recent decision of this Court in *Oregon-Washington R. R. and Nav. Co. vs. Washington*, 70 L. ed. 332. In that case, acting under a state statute, the Director of Agriculture of the State of Washington promulgated quarantine regulations, forbidding the importation from certain areas of alfalfa hay and meal except under named conditions. It was conceded that Congress had assumed control of the field and had given the Secretary of Agriculture full power to quarantine, though the secretary had not acted.

There is no analogy between that case and the case at bar. In that case, Congress had taken control of the specific subject matter by giving the Secretary of Agriculture full authority and responsibility to declare quarantines.

This was the precise field entered by the state statute. The fact that the Secretary of Agriculture had failed to act was of no moment, the federal act itself being a complete bar to the state. Only by holding that the Boiler Inspection Law, in the case at bar, gives the interstate commerce commission full power to prescribe what appurtenances and appliances shall be used to keep locomotives, boilers and tenders in proper condition and safe to operate, can the decision in the *Washington* case be made to apply. We submit that such a holding would be contrary to the holding of this Court in *Baltimore and O. R. Co. vs. Groeger, supra.*

Appellee states we contend that even if the commission did have power, under the act, to require automatic firedoors, it has not exercised it, and the field is left open till the commission has spoken. We are unable to find where we make any such contention, and admit that it would be contrary to the decisions of this Court. On the other hand, it is our contention that if the commission had power to *order safety appliances,* which this Court holds it has not, the Georgia statute is valid, as a firedoor is not a safety appliance.

EXCLUSIVE INTENTION MUST BE CLEARLY MANIFESTED BY CONGRESS.

Appellee contends that as the Georgia statute touches an instrumentality legislated upon by Congress, the same field is occupied, and there is no occasion to divide the subject matter. Only by conceding both propositions, (1) that the federal acts give the interstate commerce commission power to order safety equipment and (2) that an automatic firedoor is a safety appliance, can the Georgia statute be brought within the *subject matter* of the federal acts. The first proposition has been decided adversely by this Court and the second is not the fact.

Even if this Court should hold that the Boiler Inspection Law gives the Interstate Commerce Commission power to order safety appliances, which would be a reversal of the decision in the *Baltimore and Ohio R. Co.* case, *supra,* we earnestly contend it would not determine the instant case. An automatic firedoor is not a safety appliance but is a protective device. As pointed out in our original brief, its primary purpose is not to promote safety in operation, but it is a protection to the train crew *after* an accident has happened and also protects the health of the fireman and conserves his strength. It may incidentally promote safety after the emergency has arisen.

At this late day it cannot be maintained that even if Congress has fully occupied the field of regulation *as regards safety* of locomotives, therefore the states are entirely excluded from *all* regulation touching locomotives. This is to deny repeated decisions of this Court. In *Missouri K. & T. R. Company vs. Harris,* 234 U. S., 412, 58 L. Ed. 1377, this Court said, page 418:

> "These cases recognize the established rule that a state law enacted under any of the reserved powers—especially if under the police power—is not to be set aside as inconsistent with an act of Congress, *unless there is actual repugnance, or unless Congress has, at least, manifested a purpose to exercise its paramount authority over the subject.* The rule rests upon fundamental grounds that should not be disregarded." (Italics ours)

In *Savage vs. Jones,* 225 U. S., 501, 533, 56 L. Ed., 1182, 1194, 32 Sup. Ct. Rep., 715, the Court said:

> "The intent to supersede the exercise by the state of its police power as to matters not covered by the Federal legislation is not to be inferred from the mere fact that Congress has seen fit to circumscribe its regulation and to occupy a limited field. In other

words, *such intent is not to be implied unless the act of Congress, fairly interpreted, is in actual conflict with the law of the state.*" (Italics ours)

In support of their contention that Congress has manifested an intention to fully occupy the field appellee relies on *Oregon-Washington R. R. and Nav. Co. vs. Washington, supra; Northern Pacific Ry. Co. vs. Washington*, 222 U. S. 370; *Erie Railroad Co. vs. New York*, 233 U. S. 671, and the *Minnesota Rate Cases*, 230 U. S. 352. The first case is a quarantine case where Congress had occupied the field by giving authority to the Secretary of Agriculture to declare quarantines, the *Northern Pacific Ry. Co.* and *Erie Railroad Co.* cases both involve state statutes regulating Hours of Labor subsequent to the enactment of the federal Hours of Service Law. In each of these cases Congress had legislated directly on the specific subject matter and there is no analogy between those and the instant case.

The Boiler Inspection Act is what it is named—an inspection law. To bring the case at bar within the rule laid down in the cases last cited it becomes necessary to hold that this inspection law contains the implied power to order safety appliances—contrary to the holding in *Baltimore and O. R. Co. vs. Groeger, supra*—and to hold that an automatic firedoor is a safety appliance or intended to promote safety in operation for which there is no justification.

If the Boiler Inspection Law has the scope contended for by appellee it might be pertinent to inquire to what extent it will be carried. There are many state statutes and municipal ordinances regulating and interfering with locomotives used in interstate commerce. State statutes providing for full crews, examination of engineers, blowing whistles at crossings and the like, and ordinances with reference to smoke emitted by locomotives, regulating the

speed of trains, against unnecessary noises, for cutting trains at crossings and the like. Many of these statutes and ordinances affect the safety of trains and locomotives. Can it be said they are all invalid as invading the field occupied by Congress by the Boiler Inspection Law?

We submit that such a conclusion would lead to an absurdity. This Court is asked to hold, that in matters purely local in their nature, the states and municipalities are excluded from making any regulation that might remotely or indirectly affect the safety of locomotives. That as to all such matters, until Congress or the commission acts, a hiatus is created in which there is no regulation. A hiatus is as abhorrent to the law as is a vacuum to nature. All this on an implied power to which no reference is made in the body of the statute and contrary to the decision in *Baltimore and O. R. Co. vs. Groeger, supra.*

CONCLUSION.

We therefore respectfully submit that the Federal Boiler Inspection Law and its amendments simply cover the field of inspection to determine that locomotives used in interstate commerce are "in proper condition and safe to operate" in the service to which they may be put, and prohibiting their use till such condition is so determined.

That the Georgia statute, requiring an automatic firedoor is not an invasion of this field and is not in conflict with the exercise of any paramount power by Congress.

Respectfully submitted,

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